UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 121

Docket No. SF-0353-09-0588-I-1

John P. Sanchez,

Appellant,

v.

United States Postal Service,

Agency.

June 25, 2010

John P. Sanchez, Fontana, California, pro se.

Geraldine O. Rowe, Esquire, Long Beach, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed his restoration appeal for lack of jurisdiction. For the reasons set forth below, we DENY the petition for failure to meet the Board's review criteria under 5 C.F.R. § 1201.115(d), REOPEN the appeal on the Board's own motion under 5 C.F.R. § 1201.118, REVERSE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant is a non-preference eligible Mail Processing Clerk at the agency's Pasadena Processing and Distribution Center (P&DC). Initial Appeal File (IAF), Tab 1 at 2, Tab 8 at 55. On September 3, 1992, the appellant suffered a compensable injury. Thereafter, the appellant began work in a series of limited duty assignments,[1] most recently in an assignment that required him to perform various stocking, data entry, and clerical functions. IAF, Tab 7, Subtabs 1-2.

¶3 In 2009, the Sierra Coastal District, of which the Pasadena P&DC is a part, began to participate in a National Reassessment Process (NRP) Pilot Program. IAF, Tab 9 at 7-8. Under the NRP, supervisors and managers of employees performing limited duty review those employees' assignments to ensure that they are consistent with the employees' medical restrictions and contain only "operationally necessary tasks." IAF, Tab 7, Subtab 4, Tab 9 at 10-12. If a limited duty assignment does not meet these criteria, the NRP prescribes procedures for identifying and offering alternative limited duty assignments that do meet the criteria. IAF, Tab 9 at 12-15. If the supervisor or manager is unable to identify any operationally necessary tasks available within the employee's work restrictions, the employee will be sent home until such work becomes available or his medical restrictions change. *Id*. at 13-14, 16. During the employee's absence, he will account for work hours through the use of approved leave, leave without pay, or a continuation of pay.[2] *Id*. at 13-15.

¶4 On April 8, 2009, the agency issued the appellant a letter stating in relevant part that, because there was no operationally necessary work available for the

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[1] In the U.S. Postal Service, "limited duty" refers to modified work provided to employees who have medical restrictions due to work-related injuries, whereas "light duty" refers to modified work provided to employees who have medical restrictions due to nonwork-related injuries. *Simonton v. U.S. Postal Service*, 85 M.S.P.R. 189, ¶ 8 (2000).

[2] The right to continuation of pay is governed by 20 C.F.R. part 10, subpart C.

appellant within his medical restrictions and within his regular duty hours at the Pasadena P&DC, the appellant should not report again for duty unless he was informed that such work had become available. IAF, Tab 7, Subtab 3; *see* IAF, Tab 8 at 64. During this absence, the agency directed the appellant to account for his work hours through the use of leave or continuation of pay. IAF, Tab 7, Subtab 3. The agency later expanded its search for alternative positions within the appellant's medical restrictions beyond his tour of duty and current facility, but still found none were available. IAF, Tab 8 at 63, 65.

¶5 On May 15, 2009, the appellant filed a Board appeal of the agency's action, alleging that the agency improperly denied him restoration and that the agency failed to accommodate his medical condition. IAF, Tab 1 at 1, 4. The administrative judge issued an acknowledgment order notifying the appellant of his jurisdictional burden in a restoration appeal as a partially recovered employee and ordering him to file evidence and argument on the issue. IAF, Tab 2 at 2. The administrative judge also informed the appellant of his burden of proof on the timeliness of his appeal and ordered the parties to file evidence and argument thereon. *Id*. at 2-3.

¶6 The appellant filed a response addressing the timeliness and jurisdictional issues, and alleging that he had been constructively suspended. IAF, Tab 7 at 1-7. The agency filed a reply, arguing that the appeal should be dismissed for lack of jurisdiction, or alternatively, as untimely filed. IAF, Tab 8 at 9-13. The appellant waived his right to a hearing. IAF, Tab 14 at 5.

¶7 The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 18, Initial Decision (ID) at 2, 6. She found that the appellant failed to make a nonfrivolous allegation that the agency's discontinuation of his limited duty assignment was an arbitrary and capricious denial of restoration. ID at 4-5. Accordingly, the administrative judge found it unnecessary to decide whether the appellant satisfied the other jurisdictional

requirements for a restoration appeal. ID at 4. She also found it unnecessary to reach the timeliness issue. ID at 1 n.1.

¶8 The appellant has filed a petition for review, requesting compensation for his loss of annual leave and Thrift Savings Plan contributions, and expressing his dissatisfaction with the agency's decision to discontinue his limited duty assignment. Petition for Review File (PFR File), Tab 1 at 4. The agency has filed a brief response, arguing that the petition for review should be denied for failure to meet the review criteria. PFR File, Tab 3 at 4-5.

ANALYSIS

Denial of restoration

¶9 The Federal Employees' Compensation Act and its corresponding regulations at 5 C.F.R. part 353 provide that federal employees who suffer compensable injuries enjoy certain rights to be restored to their previous or comparable positions. 5 U.S.C. § 8151; *Walley v. Department of Veterans Affairs*, 279 F.3d 1010, 1015 (Fed. Cir. 2002); *Tat v. U.S. Postal Service*, 109 M.S.P.R. 562, ¶ 9 (2008). In the case of a partially recovered employee, i.e., one who cannot resume the full range of regular duties but has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements, an agency must make every effort to restore the individual to a position within his medical restrictions and within the local commuting area. *Delalat v. Department of the Air Force*, 103 M.S.P.R. 448, ¶ 17 (2006); 5 C.F.R. §§ 353.102, 353.301(d).

¶10 "An individual who is partially recovered from a compensable injury may appeal to the MSPB for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration." 5 C.F.R. § 353.304(c). To establish Board jurisdiction over a restoration claim as a partially recovered

employee,[3] an appellant must make a nonfrivolous allegation that: (1) He was absent from his position due to a compensable injury; (2) he recovered sufficiently to return to duty on a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of him; (3) the agency denied his request for restoration; and (4) the agency's denial was "arbitrary and capricious." *Chen v. U.S. Postal Service*, 97 M.S.P.R. 527, ¶ 13 (2004); *see* 5 C.F.R. § 353.304(c).

¶11 In this case, the appellant made nonfrivolous allegations satisfying the first three jurisdictional criteria. IAF, Tab 7 at 3-4. The appellant's allegations in this regard are supported by the record evidence. *Id.*, Subtabs 1-3; *see Brehmer v. U.S. Postal Service*, 106 M.S.P.R. 463, ¶ 9 (2007) (discontinuation of a limited duty position may constitute a denial of restoration for purposes of Board jurisdiction under 5 C.F.R. part 353). Thus, the first three jurisdictional criteria for the appellant's restoration claim as a partially recovered employee are satisfied. *See Chen*, 97 M.S.P.R. 527, ¶ 13; 5 C.F.R. § 353.304(c)

¶12 Although the appellant's documentary submissions themselves are insufficient to satisfy the fourth jurisdictional criterion, the agency's documentary submissions are sufficient to render nonfrivolous the appellant's allegation that the denial of restoration was arbitrary and capricious. *See Baldwin v. Department of Veterans Affairs*, 109 M.S.P.R. 392, ¶¶ 11, 32 (2008) (the Board may consider the agency's documentary submissions in finding that an appellant has made a nonfrivolous allegation of Board jurisdiction). The Office of Personnel Management's (OPM) regulations provide:

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[3] It appears that the conditions underlying the appellant's medical restrictions may be "permanent and stationary," and that the appellant is therefore "physically disqualified" as that term is defined under 5 C.F.R. § 353.102. IAF, Tab 7 at 3, Subtab 1. However, because more than 1 year has passed since the appellant was first eligible for workers' compensation, the administrative judge correctly found that he is entitled to the restoration rights of a partially recovered employee. ID at 3 n.2; *see Kravitz v. Department of the Navy*, 104 M.S.P.R. 483, ¶ 5 (2007); 5 C.F.R. § 353.301(c), (d).

> Agencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended.

5 C.F.R. § 353.301(d). The Board has interpreted this regulation as requiring agencies to search within the local commuting area for vacant positions to which an agency can restore a partially recovered employee and to consider him for any such vacancies. *See Sapp v. U.S. Postal Service*, 73 M.S.P.R. 189, 193-94 (1997).

¶13 "For restoration rights purposes, the local commuting area is the geographic area in which an individual lives and can reasonably be expected to travel back and forth daily to his usual duty station." *Hicks v. U.S. Postal Service*, 83 M.S.P.R. 599, ¶ 9 (1999). It includes any population center, or two or more neighboring ones, and the surrounding localities. *Sapp*, 73 M.S.P.R. at 193. The question of what constitutes a local commuting area is one of fact. The extent of a commuting area is ordinarily determined by factors such as common practice, the availability and cost of public transportation or the convenience and adequacy of highways, and the travel time required to go to and from work. *See Beardmore v. Department of Agriculture*, 761 F.2d 677, 678 (Fed. Cir. 1985) (defining "local commuting area" in the context of a reassignment).

¶14 In this case, the agency's documentary submissions show that its job search encompassed "all installations in the Sierra Coastal District within 50 miles of the Pasadena P&DC." IAF, Tab 17 at 5; *see* Tab 8 at 65, Tab 12 at 15-16. The agency's submissions further suggest, however, that the local commuting area may include all or part of other districts, including the Los Angeles and Santa Ana districts. IAF, Tab 12 at 9-10, 19-20. Because the agency's search for available work was apparently limited to a single district, whether the agency searched the entire commuting area remains an unanswered question of material

fact. Evidence that the agency failed to search the commuting area as required by 5 C.F.R. § 353.301(d) constitutes a nonfrivolous allegation that the agency acted arbitrarily and capriciously in denying restoration. *See Barachina v. U.S. Postal Service*, 113 M.S.P.R. 12, ¶ 7 (2009); *Urena v. U.S. Postal Service*, 113 M.S.P.R. 6, ¶ 13 (2009). We therefore find that the appellant has met all of the criteria to establish Board jurisdiction over his restoration appeal, which entitles him to adjudication on the merits. *See Barrett v. U.S. Postal Service*, 107 M.S.P.R. 688, ¶ 8 (2008). Because the Board has jurisdiction to consider the merits of the appeal, the Board also has jurisdiction to consider the appellant's disability discrimination claim. 5 U.S.C. § 7702(a)(1); *Hardy v. U.S. Postal Service*, 104 M.S.P.R. 387, ¶ 29 (2007); *see* IAF, Tab 1 at 4.

¶15 In the initial decision, the administrative judge did not address the agency's obligation to consider the entire commuting area. Therefore, the record closed without exploring whether the local commuting area encompassed areas outside the Sierra Coastal District. Therefore, in the interest of justice, we reopen the record for further development on this issue, including the opportunity for further discovery by the parties. *See Sapp*, 73 M.S.P.R. at 193-94 (the Board remanded the appeal for further development of the record regarding what constituted the "local commuting area" and whether the agency's job search properly encompassed that area).

Interplay with the Rehabilitation Act

¶16 As discussed above, OPM's regulation at 5 C.F.R. § 353.301(d) requires an agency to make every effort to restore a partially recovered employee to limited duty within the local commuting area. *See also Urena*, 113 M.S.P.R. 6, ¶ 8. The regulation further provides that, at a minimum, this requires treating employees substantially the same as individuals protected under the Rehabilitation Act of 1973. 5 C.F.R. § 353.301(d). The relevant Rehabilitation Act standards are those applied under the Americans with Disabilities Act (ADA), set forth at 29 C.F.R.

part 1630. *Smith v. U.S. Postal Service*, 113 M.S.P.R. 1, ¶ 6 (2009); *Taylor v. Department of Homeland Security*, 107 M.S.P.R. 306, ¶ 8 (2007).[4]

¶17 An agency's obligation to provide reasonable accommodation to an individual with a disability under the Rehabilitation Act may include reassignment to a vacant position. 42 U.S.C. § 12111(9)(B); *Smith*, 113 M.S.P.R. 1, ¶ 6; *Taylor*, 107 M.S.P.R. 306, ¶ 8; 29 C.F.R. § 1630.2(o)(2)(ii). An appropriate reassignment would be a position for which an individual is qualified by skills, experience and education and which is equivalent in terms of pay, status or other relevant factors, such as benefits and geographical location. 29 C.F.R. part 1630 Appendix, § 1630.2(o); *Equal Employment Opportunity Commission* (*EEOC*) *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (2002) (*"EEOC Enforcement Guidance"*) at 18-19.[5]

¶18 We are cognizant that, while geographical location is a consideration in determining an appropriate reassignment under the Rehabilitation Act, the reassignment obligation under the Act is not necessarily limited by the local commuting area. 29 C.F.R. § 1630.2(o)(2)(ii). "Rather, the extent to which an

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[4] ADA standards were incorporated by reference into the Rehabilitation Act and are utilized in determining whether there has been a Rehabilitation Act violation. 29 U.S.C. § 791(g); *Pinegar v. Federal Election Commission*, 105 M.S.P.R. 677, ¶ 36 n.3 (2007); 29 C.F.R. § 1614.203(b). Thus, the Equal Employment Opportunity Commission's (EEOC's) regulations under the Rehabilitation Act were superseded by the ADA regulations. *Collins v. U.S. Postal Service*, 100 M.S.P.R. 332, ¶¶ 7-8 (2005); 29 C.F.R. § 1614.203(b). These regulations provide, among other things, that an agency must attempt to accommodate a covered individual after an individualized assessment of his situation and participation in an interactive process. 29 C.F.R. § 1630.2(o). We note that the recent ADA Amendments Act of 2008 did not alter the substantive requirements for reasonable accommodation, including reassignment. Pub. L. No. 110-325, § 6(h), 122 Stat. 3553 (2008), codified at 42 U.S.C. § 12201(h).

[5] One can be reassigned to the next lower level position for which he is qualified if an equivalent position is not available. *Taylor*, 107 M.S.P.R. 306, ¶ 8; *EEOC Enforcement Guidance* at 19. The *EEOC Enforcement Guidance* is available at www.eeoc.gov/policy/docs/accommodation.html.

employer must search for a vacant position will be an issue of undue hardship." *EEOC Enforcement Guidance* at 20, Q. 27; *see also EEOC Questions and Answers: Promoting Employment of Individuals with Disabilities in the Federal Workforce* (2008) at 18, Q. 24 ("Reassignment is not limited to the facility, commuting area, sub-component, . . . or type of work to which the individual with a disability is assigned at the time the need for accommodation arises.").[6] The language in OPM's regulation at 5 C.F.R. § 353.301(d) is explicit, however, that an agency's restoration obligation is limited to the local commuting area. OPM's intent to provide restoration rights only in the local commuting area is also clear from its explanation for adding the limiting phrase in issuing the regulation. *See* 60 Fed. Reg. 45,650 (Sept. 1, 1995) ("[Section] 353.301(d) makes clear that partially recovered employees are entitled to restoration rights only in the local commuting area, not agencywide.")[7] Therefore, we find that 5 C.F.R. § 353.301(d) requires an agency to search for a restoration assignment for partially recovered employees only in the local commuting area and that its reference to the Rehabilitation Act means that, in doing so, it undertakes substantially the same effort that it would exert under that Act when reassigning disabled employees within the local commuting area. By so reading the regulation, we have considered the text as a whole and given meaning to the entire text. *See Lengerich v. Department of the Interior*, 454 F.3d 1367, 1370 (Fed. Cir. 2006) ("[i]n interpreting a regulatory provision, we examine the text of the regulation as a whole"); *Phipps v. Department of Health & Human Services*,

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[6] The *EEOC Questions and Answers* are available at http://www.eeoc.gov/federal/qanda-employment-with-disabilities.cfm.

[7] In addition, we note that at the time OPM issued this regulation, the EEOC's regulation at 29 C.F.R. § 1614.203(g) (1994) was in effect, which limited the reassignment obligation to a funded vacant position located in the same commuting area and serviced by the same appointment authority. The substantive provisions of 29 C.F.R. § 1614.203 were superseded by the ADA regulations in 2002. *See Collins*, 100 M.S.P.R. 332, ¶¶ 7-8; 29 C.F.R. § 1614.203(b).

767 F.2d 895, 897 (Fed. Cir. 1985) (examining "the true meaning and intent of the regulations read as a whole"); *compare* 5 C.F.R. § 353.301(a)-(c) (requiring agencies to consider individuals covered under those sections for placement agencywide) *with* 5 C.F.R. § 353.301(d) (requiring agencies to consider individuals covered under that section for placement within the local commuting area).

Failure to Accommodate Medical Condition

¶19 In this Opinion and Order, we have only addressed the scope of the agency's reassignment obligation under 5 C.F.R. § 353.301(d) but we make no determination as to the scope of its obligation under the Rehabilitation Act. Rather, the administrative judge should address this issue on remand in the context of the appellant's disability discrimination claim. *See* IAF, Tab 1 at 4; *cf. Sapp v. U.S. Postal Service*, 82 M.S.P.R. 411, ¶¶ 13-15 (1999) (finding that the appellant's restoration rights and right to reassignment under disability discrimination law are not synonymous and require separate adjudication) (clarifying *Sapp*, 73 M.S.P.R. at 194-95). The administrative judge should take into consideration the results of the interactive process required to determine an appropriate accommodation. *See Paris v. Department of the Treasury*, 104 M.S.P.R. 331, ¶ 17 (2006); 29 C.F.R. § 1630.2(o)(3); *see also EEOC Enforcement Guidance* at 6. "Both parties . . . have an obligation to assist in the search for an appropriate accommodation, and both have an obligation to act in good faith in doing so." *Collins*, 100 M.S.P.R. 332, ¶ 11 (citing *Taylor v. Phoenixville School District*, 184 F.3d 296, 312 (3d Cir. 1999)).

Constructive Suspension

¶20 Although the appellant alleged that his denial of restoration constituted a constructive suspension, IAF, Tab 7 at 7, the administrative judge failed to address the issue in the initial decision and she did not inform the appellant of his jurisdictional burden in a constructive suspension appeal. *See Burgess v. Merit*

Systems Protection Board, 758 F.2d 641, 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue); *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980) (an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests).

¶21 A Postal Service employee may file a Board appeal of an adverse action under 5 U.S.C. chapter 75 only if he is covered by 39 U.S.C. § 1005(a) or 5 U.S.C. § 7511(a)(1)(B). 5 U.S.C. § 7511(b)(8). Thus, to appeal an adverse action under chapter 75, a Postal employee (1) must be a preference eligible, a management or supervisory employee, or an employee engaged in personnel work in other than a purely nonconfidential clerical capacity, and (2) must have completed 1 year of current continuous service in the same or similar positions. *Paige v. U.S. Postal Service*, 106 M.S.P.R. 299, ¶ 11 (2007). Based on the record evidence below, it appears that the appellant would be unable to establish Board jurisdiction under this standard because he lacks veterans' preference status, and he does not appear to be a manager, supervisor, or employee engaged in personnel work. IAF, Tab 1 at 2, Tab 8 at 55; *see Coe v. U.S. Postal Service*, 95 M.S.P.R. 629, ¶¶ 2, 4 (2004). Nevertheless, as explained above, the appellant did not have an adequate opportunity to address the issue below. Therefore, if the appellant wishes to pursue his constructive suspension claim on remand, the administrative judge shall properly notify him of his jurisdictional burden and afford the parties an opportunity to submit evidence and argument on the issue. *See Brehmer*, 106 M.S.P.R. 463, ¶ 7.

Timeliness

¶22 To be timely, an appeal must generally be filed within 30 days after the effective date of the action being appealed or 30 days after the appellant's receipt of the agency's decision, whichever is later. 5 C.F.R. § 1201.22(b). The

appellant bears the burden of proving either that his appeal was timely, or that good cause existed for the delay. *Harrison v. Department of Veterans Affairs*, 96 M.S.P.R. 571, ¶ 5 (2004); 5 C.F.R. § 1201.56(a)(2)(ii). The agency discontinued the appellant's limited duty assignment, effectively denying him restoration, on April 8, 2009, IAF, Tab 7, Subtab 3, and the appellant claims that he received the agency's decision letter that same day, IAF, Tab 1 at 4. Thus, the deadline for filing a timely appeal was May 8, 2009. *See* 5 C.F.R. § 1201.23. The appellant filed his appeal electronically on May 15, 2009,[8] 7 days untimely. IAF, Tab 1 at 1.

¶23 In response to the administrative judge's order on timeliness, the appellant made unrebutted allegations that he failed to timely file because the agency did not notify him of his Board appeal rights when it discontinued his limited duty assignment. IAF, Tab 7 at 1, 7. The record corroborates the appellant's allegation inasmuch as the agency's notice to the appellant regarding the discontinuation of his limited duty assignment does not provide notice of Board appeal rights. *Id.*, Subtab 3. Because the agency was required by regulation to notify the appellant of his Board appeal rights when it discontinued his limited duty assignment, the untimeliness of the appeal may be excused if the agency failed to give the appellant the required notice and the appellant acted diligently in filing his appeal after he actually learned of his appeal rights. *See Nevins v. U.S. Postal Service*, 107 M.S.P.R. 595, ¶ 20 (2008); *Cranston v. U.S. Postal Service*, 106 M.S.P.R. 290, ¶¶ 9-14 (2007); 5 C.F.R. § 353.104.

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[8] The e-mail to the Western Regional Office generated by the appellant's filing in the Board's e-appeal system is dated May 15, 2009, at 9:11 p.m., but the "Submission Date" found at the bottom of the appeal form itself is May 16, 2009, at 12:07 a.m. IAF, Tab 1 at 1-2. The discrepancy is probably due to the fact that the Board's automated petition for review online interview form operates on Eastern Standard Time and did not account for the fact that the appellant (who lives in California) filed in a different time zone.

¶24 Although the timeliness issue must be reached in light of our finding that the Board has jurisdiction over the appeal, the record is not sufficiently developed for the Board to decide the issue on review. Most importantly, the record does not show when the appellant actually became aware of his Board appeal rights. Although the appellant bears the burden of proof on timeliness, we find that he was not afforded adequate notice below of the precise timeliness issues involved in a case where the agency has failed to give required notice of Board appeal rights. *See Wright v. Department of Transportation*, 99 M.S.P.R. 112, ¶ 12 (2005) (an appellant is entitled to clear notice of the precise timeliness issue and a full and fair opportunity to litigate it). Therefore, on remand, the administrative judge shall notify the appellant of the relevant timeliness issues and afford the parties an opportunity to submit further evidence and argument on the matter.

ORDER

¶25 Accordingly, we reverse the initial decision and remand the appeal to the Western Regional Office for further adjudication of the appeal consistent with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.